

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CEDRIC RAYMOND THOMAS,

Defendant-Appellant.

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UNPUBLISHED

August 11, 2005

No. 253517

Jackson Circuit Court

LC No. 03-000828-FH

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant Cedric Thomas appeals as of right his sentence of one year, four months to four years<sup>1</sup> imposed on his jury conviction of possession of ecstasy.<sup>2</sup> We affirm. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Basic Facts And Procedural History

The statutory sentencing guidelines established a minimum term of 0 to 16 months.<sup>3</sup> At sentencing, the trial court remarked that it saw no point in imposing a jail sentence because Thomas, who was on parole when he committed the instant offense, would return to prison under

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<sup>1</sup> The Department of Corrections' Offender Tracking Information Service indicates that Thomas was paroled on May 6, 2005. We conclude that Thomas's challenge to his sentence is not moot because he is on parole.

<sup>2</sup> MCL 333.7403(2)(b)(ii).

<sup>3</sup> Under the statutory sentencing guidelines, if the upper limit of the established minimum sentence range is eighteen months or less, the trial court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit the defendant to the Department of Corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the guidelines range or twelve months, whichever is less. MCL 769.34(4)(a). An intermediate sanction does not include a prison term. MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

any circumstances. The trial court then sentenced him as a third habitual offender<sup>4</sup> to one year, four months to four years in prison.

Thomas moved for resentencing, arguing that the trial court failed to articulate substantial and compelling reasons for departing from the guidelines. The trial court held a hearing, at which Thomas was not present, and denied the motion. The trial court stated that it found that substantial and compelling reasons existed to exceed the guidelines, noted again that Thomas would return to prison regardless of the sentence imposed, and indicated that had Thomas appeared in the courtroom, it would have imposed the same sentence. The trial court completed a sentencing information report departure evaluation indicating that it departed from the guidelines because Thomas had failed on parole and had previous controlled substances offenses, and because he would have been returned to prison under any circumstances.

## II. Guidelines Departure

### A. Standard Of Review

We review the trial court's factual determination respecting the existence or nonexistence of a particular factor for clear error; we review de novo the determination that a particular factor is objective and verifiable; and we review the trial court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence for an abuse of discretion.<sup>5</sup> An abuse of discretion occurs in this context when the trial court chooses an outcome falling outside the reasonable and principled range of possible outcomes.<sup>6</sup>

### B. Legal Standards

The trial court may depart from the sentencing guidelines only if it has a "substantial and compelling" reason to do so, and states that reason on the record.<sup>7</sup> To constitute a substantial and compelling reason for departing from the guidelines, a reason must be objective and verifiable, must irresistibly attract the attention of the court, and must be of considerable worth in deciding the length of the sentence.<sup>8</sup> The trial court must articulate the reason for the departure on the record, and this reason must justify the particular departure at issue.<sup>9</sup> A trial court may depart from the guidelines for nondiscriminatory reasons based on an offense or offender

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<sup>4</sup> MCL 769.11.

<sup>5</sup> *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

<sup>6</sup> *Id.* at 269.

<sup>7</sup> MCL 769.34(3); *Babcock*, *supra* at 256.

<sup>8</sup> See *Babcock*, *supra* at 257-258.

<sup>9</sup> *Id.* at 260; MCL 769.34(3).

characteristic which was already considered in calculating the guidelines if the trial court concludes that the characteristic was given inadequate or disproportionate weight.<sup>10</sup>

In determining whether a sufficient basis exists to depart from the sentencing guidelines, the trial court must ascertain whether the departure would result in a sentence more proportionate to the seriousness of the offense and the defendant's criminal history than would adherence to the guidelines range.<sup>11</sup> In addition, in departing from the guidelines range, the trial court must determine whether the particular departure is proportionate to the circumstances of the offense and the history of the offender.<sup>12</sup> If the stated reasons are partially invalid and the appellate court cannot ascertain whether the trial court would have departed to the same extent regardless of the invalid factors, remand for resentencing or rearticulation is necessary.<sup>13</sup>

### C. Previous Controlled Substances Convictions

At the initial sentencing hearing, the trial court failed to impose an intermediate sanction, and did not articulate substantial and compelling reasons for exceeding the guidelines. The trial court did not explain why the fact that Thomas would return to prison regardless of the sentence imposed in this case rendered a prison sentence in this case more proportionate than a jail term.<sup>14</sup> However, at the hearing on Thomas's motion for resentencing, the trial court stated that the sentence of one year, four months to four years in prison was appropriate because Thomas had a prior record, was on parole when he committed the instant offense, and would return to prison under any circumstances.

Although Thomas's prior record and status as a parole violator were taken into account in the calculation of the guidelines,<sup>15</sup> the fact that Thomas's prior record consisted entirely of convictions for controlled substances offenses was not given adequate weight in the preparation of the guidelines.<sup>16</sup> The trial court's stated reasons for exceeding the guidelines were partially valid and partially invalid, but the trial court clearly stated that it considered the sentence appropriate. We conclude that the trial court would have imposed the same sentence regardless of the invalid factor, and we therefore affirm the sentence.<sup>17</sup>

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<sup>10</sup> MCL 769.34(3)(b).

<sup>11</sup> *Babcock*, *supra* at 262-264; *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

<sup>12</sup> *Babcock*, *supra* at 264.

<sup>13</sup> *Id.* at 260-261.

<sup>14</sup> See *Babcock*, *supra* at 259.

<sup>15</sup> See MCL 777.51; MCL 777.52; MCL 777.56.

<sup>16</sup> See MCL 769.34(3)(b).

<sup>17</sup> See *Babcock*, *supra* at 260-261.

#### D. Thomas's Absence From Resentencing Hearing

Thomas is not entitled to resentencing on the ground that he was not present at the hearing on the motion for resentencing. The trial court did not resentence Thomas, but merely affirmed that the sentence previously imposed was appropriate. The trial court's completion of the guidelines departure form after the hearing rather than at the time of the initial sentencing does not warrant relief.<sup>18</sup>

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ E. Thomas Fitzgerald

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<sup>18</sup> See *People v Armstrong*, 247 Mich App 423, 427; 636 NW2d 785 (2001) (characterizing completion of the form as a "ministerial task").